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No. 03-464

In the Supreme Court of the United States

THE CONSOLIDATED MUNICIPALITY
OF CARSON CITY, NEVADA,

Petitioner,

v.

DAVID Q. WEBB,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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15 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases:

Brown v. *Neumann*, 188 F.3d 1289 (11th Cir. 1999) (per curiam) 5, 6, 9

Cairns v. *Sheriff, Clark County*, 508 P.2d 1015 (Nev. 1973) 8

City of St. Louis v. *Praprotnik*, 485 U.S. 112 (1988) 9

Cole v. *Richardson*, 405 U.S. 676 (1972) 8

Edgar v. *Wagner*, 699 P.2d 110 (Nev. 1985) (per curiam) 7

Imbler v. *Pachtman*, 424 U.S. 409 (1976) 7

Jett v. *Dallas Indep. School Dist.*, 491 U.S. 701 (1989) ... 6

Lane v. *Second Judicial Dist. Court*, 760 P.2d 1245 (Nev. 1988) 8

Leavitt v. *Jane L.*, 518 U.S. 137 (1996) (per curiam) ... 8, 9

McMillian v. *Monroe County*, 520 U.S. 781 (1997) .. 4, 7, 8

Monell v. *Department of Soc. Servs.*, 436 U.S. 658 (1978) 1

Moor v. *County of Alameda*, 411 U.S. 693 (1973) (per curiam) 6

TABLE OF AUTHORITIES—Continued

Page(s)

Pembaur v. *City of Cincinnati*, 475 U.S. 469 (1986) 4

Propper v. *Clark*, 337 U.S. 472 (1949) 9

Salve Regina College v. *Russell*, 499 U.S. 225 (1991) 9

Statutes:

FLA. STAT. § 30.07 6

NEV. REV. STAT. § 252.070(1) ..... *passim*

NEV. REV. STAT. § 252.070(2) 6

Miscellaneous:

Brief of Appellee, *Brown* v. *Neumann*, No. 98-5722, 1999 WL 33618580 (June 14, 1999) 8

REPLY BRIEF FOR PETITIONER

The briefs in opposition submitted by respondent David Webb and by putative intervenor Cooke & Story, Ltd. ("Cooke & Story"), a law firm that represented Webb in the lower courts, are most notable for what they do not say. Neither seriously disputes the existence of the circuit conflicts identified in the petition (at 22-24, 28-29) on both questions presented. Neither denies that this Court's case law in the area of municipal liability – and in particular, the legal framework governing the determination whether a municipal employee is a "final policymaker" under *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658 (1978) – would benefit from clarification. See Pet. 12-13, 20-22, 27. Neither disputes our showing (Pet.18-19 & nn.4-5) that many other States have statutes identical to or indistinguishable from NEV. REV. STAT. § 252.070(1), so that the impact of the Ninth Circuit's decision will be felt far outside Nevada. See also Br. *Amicus Curiae* of Nevada Public Agency Insurance Pool, at 3-5. And neither denies that the Ninth Circuit's decision effectively allows plaintiffs in Section 1983 actions to circumvent the protections of absolute immunity afforded to prosecutors.

Apart from discussing miscellaneous record facts that have no bearing on the pure questions of law presented in the petition, respondent and his former law firm devote most of their efforts to disputing our reading of the Ninth Circuit's decision. These arguments are meritless. Further review is plainly warranted.

1. Respondent and his former law firm would like this Court to believe that petitioner is merely disputing the factual findings of the jury. That submission, however, is incorrect.

Contrary to Cooke & Story's suggestion (at 6-9), the Ninth Circuit's decision squarely holds, as a matter of law, that Carson City Deputy District Attorneys are final policymakers based *exclusively* on NEV. REV. STAT. § 252.070(1). See Pet. App. 8a-11a. Indeed, the panel began its analysis by stating:

> Plaintiff argues that he proved *both* that Carson City had a longstanding practice or custom of incarcerating and prosecuting people it knows to be innocent *and* that municipal liability is proper in this case because the deputy district attorneys were acting with final policymaking authority. Because we agree with the second argument, a question that we previously left open, we need not reach the first.

Pet. App. 7a (citation omitted). It is the Ninth Circuit's resolution of this question of law that petitioner challenges, not any factual finding by the jury.

Moreover, Cooke & Story's argument ignores the fact that the *district court* also resolved the question of final policymaking authority against Carson City *as a matter of law* (again, solely on the basis of NEV. REV. STAT. § 252.070(1)). See Pet. 5-8. On the strength of that pre-trial ruling, and over the City's objection, the district court gave three instructions (unmentioned in Cooke & Story's brief) that established for the jurors that deputy district attorneys are final policymakers as a matter of law. See Pet. 7-8. Those instructions, upheld by the Ninth Circuit as a correct statement of the law, relieved the jury of the need to make any factual inquiry about the policymaking authority of deputy district attorneys or whether they actually exercised that authority. The instructions also affirmatively directed the jury to ignore any evidence on the subject by deciding the issue as a matter of law. Thus, there was no finding of fact for the jury to make on this point.

To be sure, the court of appeals did hint at the possibility that a municipality might, in certain circumstances, be able to show that the final policymaking authority supposedly conferred on deputy district attorneys by NEV. REV. STAT. § 252.070(1) was *constrained* by the principal district attorney. See Pet. 10-11. But the panel dismissed that possibility in this case on the ground that "Carson City presented no evidence that its principal district attorney actually has constrained the deputies' authority." Pet. App. 10a. As we explained in the petition (at 27-29), the Ninth Circuit's placement of the burden of proof *on*

the municipal defendant is wrong and conflicts with the decisions of other circuits. But here again, petitioner is not challenging a factual finding made by the jury but rather the Ninth Circuit's resolution of a pure question of law: Who bears the burden of proving the existence of final policymaking authority in a *Monell* action under Section 1983?[1]

2. Cooke & Story also disagrees (at 13) that the Ninth Circuit "shifted the burden of proof from a civil rights plaintiff to a municipality to demonstrate that the municipality had not delegated final policymaking authority from a policymaking elected official to his or her deputy." But it is difficult, at best, to attach any other meaning to the Ninth Circuit's words:

> We are mindful that the Nevada statutory text is permissive, not mandatory: Deputies *may* transact official business to the same extent as their principals. Conceivably, the principal prosecutor could constrain that authority. That possibility does not change our analysis, *because Carson City presented no evidence* that its principal district attorney actually has constrained the deputies' authority.

Pet. App. 10a (emphasis added in part). What could that possibly mean if not that the municipality has the burden of proof on this issue? There is no other plausible reading, and none suggested by Cooke & Story or by the respondent.[2]

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[1] To the extent that the petition discusses the evidence presented in Carson City's case-in-chief relating to the existence of a municipal policy *not* to prosecute without probable cause (see Pet. 6-7, 14-15), it does so only to demonstrate the problems (and perverse outcomes) that flow from applying the two rules of law adopted by the Ninth Circuit. Notably, neither respondent nor its former law firm disputes that (a) evidence was presented at trial that the Carson City District Attorney's office had a policy of *not* prosecuting in the absence of probable cause, and (b) both the court of appeals and the district court decided the issue of municipal policymaking authority without any reference to that evidence.

[2] It is no answer to say, as Cooke & Story does (at 13-14), that there was

3. Cooke & Story next maintains (at 6, 9, 14) that petitioner is really just challenging "an alleged misapplication of a correctly stated rule of law." To support that claim, the law firm points to petitioner's acknowledgment that, under *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986), and *McMillian* v. *Monroe County*, 520 U.S. 781 (1997), the question whether the municipal official's "actual function" is that of a "final policymaker" for the municipality is "dependent" on state law. *McMillian*, 520 U.S. at 786.

Cooke & Story's argument is mistaken. As explained in the petition (at 12-16), the Ninth Circuit's decision is *inconsistent with* this Court's decisions because it ignores the crucial distinction between *policymaking* authority on the one hand and *decisionmaking* authority (or discretion) on the other. The Ninth Circuit simply lost sight of the nature of its task under this Court's decisions: rather than consider who has authority to make *municipal policy* – the question that this Court's precedents dictate must be asked *even when the single act of one individual is at issue* – the Ninth Circuit focused on who had *decisionmaking authority* about Mr. Webb's prosecution, as if every decision about every prosecution were *ipso facto* the making of municipal policy. In making that error, the Ninth Circuit contradicted this Court's precedents and placed itself in conflict with many other circuits. Thus, Cooke & Story is wrong to suggest that petitioner's argument is that a correct rule

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evidence presented *by Carson City* that any deputy in the office had the *discretion* to dismiss the charges against respondent without consulting with a supervisor. Not only does that argument (once again) confuse discretion with final policymaking authority, but it also ignores the fact that the district court denied Carson City's motion to dismiss at the close of Webb's case (before any of this evidence was presented). See Pet. 6. Only by assigning to Carson City the burden of proof on this issue could the Ninth Circuit affirm the judgment.

of law was misapplied by the Ninth Circuit. The correct rule of law was *disregarded*.[3]

Even with respect to the subsidiary principle that state law informs the inquiry into whether a municipal official has final policymaking authority, Cooke & Story's argument fails. To be sure, petitioner does acknowledge that this inquiry is dependent on state law. But, as explained in the petition, the Ninth Circuit was wrong to place "unquestioning reliance on state law to the exclusion of all other evidence." Pet. 19. Indeed, as we showed in the petition (at 19-20), the Ninth Circuit's approach in this regard is flatly inconsistent with *McMillian*.

4. Urging this Court to grant review, putative *amicus curiae* Nevada Public Agency Insurance Pool helpfully points out (at 7-8) that the decision below also squarely conflicts with the Eleventh Circuit's decision in *Brown* v. *Neumann*, 188 F.3d 1289 (1999) (per curiam). In *Brown*, the plaintiffs brought a municipal liability claim under *Monell* based on arrests made by a Deputy Sheriff of Palm Beach County. The plaintiffs "concede[d] that the Deputy Sheriff was not carrying out the instructions of the Sheriff, that the Sheriff did not know about, ratify, or consent to the Deputy Sheriff's acts, and that there was no custom of unjustified arrests." 188 F.3d at 1290.

Nonetheless, the plaintiffs maintained that "the following Florida statute effectively confers final decisionmaking authority directly on Deputy Sheriffs for *Monell* purposes:

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[3] To distinguish between policymaking authority and discretion, some factual inquiry is necessary. As *Praprotnik* points out, even an official with policymaking authority can make decisions that do not constitute an exercise of that authority. Only an understanding of the function and practices of a particular official in the context of her governmental responsibilities will make it possible to draw the line between the exercise of discretion and the exercise of policymaking authority. The Ninth Circuit erred in refusing to conduct such an inquiry.

> 'Sheriffs may appoint deputies to act under them who *shall have the same power as the sheriff appointing them*, and for the neglect and default of whom in the execution of their office the sheriff shall be responsible.'

Fla. Stat. § 30.07." 188 F.3d at 1291 (emphasis added). Compare NEV. REV. STAT. § 252.070(1) ("All district attorneys are authorized to appoint deputies, who may transact all official business relating to the offices to the same extent as their principals."). "The *only reasonable interpretation*" of the highlighted language, the Eleventh Circuit explained, "is that it does not put Deputy Sheriffs on a par with Sheriffs in terms of final policymaking authority, and that the power referred to encompasses merely those powers which the Sheriff chooses actually to delegate." 188 F.3d at 1291 (emphasis added). "[I]t would be contrary to common sense," the Eleventh Circuit added, "to hold that a Deputy Sheriff's discretionary decisions in the field amount to official policy * * * ." *Ibid.* Exactly so.[4]

5. Predictably, respondent and his former law firm both claim that the decision below is correct. But both apparently fail to grasp the fundamental distinction between decisionmaking authority (or discretion) and policymaking authority – the same mistake made by the Ninth Circuit. See Cooke & Story Br. in Opp. 11-12. Thus, the law firm recycles

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[4] Interestingly, in *Brown* the municipality's lawyer argued on appeal that the Florida statute was "simply a restatement of the doctrine of *respondeat superior*." Brief of Appellee, *Brown* v. *Neumann*, No. 98-5722, 1999 WL 33618580, at *9 (June 14, 1999). The same may also be true of NEV. REV. STAT. § 252.070(1), which immediately precedes a provision stating: "District attorneys are responsible on their official bonds for all official malfeasance or nonfeasance of the deputies." NEV. REV. STAT. § 252.070(2). If so, that would be all the more reason why the Ninth Circuit went astray. See also *Moor* v. *County of Alameda*, 411 U.S. 693, 706 (1973) (per curiam) (rejecting incorporation, under 42 U.S.C. § 1988, of state-law rule of vicarious liability as inconsistent with Congress's intent concerning the scope of municipal liability); accord *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. 701, 733 (1989).

the argument that deputy prosecutors in Nevada necessarily have *policymaking* authority because they have discretion or decisonmaking authority over how criminal prosecutions are conducted. *Id.* at 10-11. That is a *non sequitur*. See Pet. 16-18. Nor is the law firm correct in saying (at 10) that NEV. REV. STAT. § 252.070(1) expressly confers policymaking authority directly on deputies. The statute makes no mention of policymaking authority; it refers instead to deputies' being authorized to "transact" the "official business relating to" their offices. The statute does nothing more than allow the district attorney to carry out his statutory responsibilities through deputies. See also note 4, *supra*.[5]

6. Lastly, Cooke & Story points out (at 12-13) that this Court often defers to interpretations of state law that have been accepted by the lower federal courts. In particular, it cites this Court's decision in *McMillian* v. *Monroe County*, 520 U.S. 781 (1997), where the majority indicated that it would defer to the expertise of the Eleventh Circuit in interpreting Alabama law. *Id.* at 786 & n.3; compare *id.* at 798 n.1 (Ginsburg, J., joined by Stevens, Souter and Breyer, JJ., dissenting) (stating that "[d]eference * * * does not supplant careful review").

For at least three reasons, *McMillian* presented a much stronger case for deference. *First*, in deferring to the lower court there, this Court emphasized that "two of the three judges on the Eleventh Circuit's panel are based in Alabama" and that "this is the second Eleventh Circuit panel" to have adopted a particular interpretation of Alabama law. 520 U.S. at 786 & n.3. Here, in contrast, the three judges on the Ninth Circuit panel are based in California and Oregon, not Nevada; and no other panel

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[5] Cooke & Story's reliance (at 12) on *Edgar* v. *Wagner*, 699 P.2d 110 (Nev. 1985) (per curiam), is misplaced. That case merely held that a district attorney who is acting "as an administrator or investigator" – as opposed to carrying out a "prosecutorial function," as the deputy district attorneys did here – is entitled to qualified rather than absolute immunity. *Id.* at 112 (citing *Imbler* v. *Pachtman*, 424 U.S. 409 (1976)).

of the Ninth Circuit has ever adopted the novel construction of NEV. REV. STAT. § 252.070(1) endorsed below. See *Leavitt* v. *Jane L.*, 518 U.S. 137, 145 (1996) (per curiam) (in summarily reversing the Tenth Circuit, noting that an argument based on "the supposed greater expertise of courts of appeals regarding state law is particularly weak" where a "panel consisting of judges from Oklahoma, Colorado, and Kansas" has decided an issue of Utah law).

Second, in *McMillian* the Alabama Supreme Court had "interpreted the[] [relevant] provisions and their historical background as evidence of 'the framers' intent to ensure that sheriffs be considered executive officers of the state'" – a fact that the *McMillian* majority cited as "critical[]." 520 U.S. at 789. Here, in contrast, the Nevada Supreme Court has never interpreted NEV. REV. STAT. § 252.070(1) as delegating final policymaking authority to deputy district attorneys. Nor has the Nevada Supreme Court interpreted the other Nevada statutes with identical language (applicable to deputy county clerks, recorders, assessors, or sheriffs, see Pet. 17) in this way.[6]

Third, in *McMillian* the embedded state-law issue involved an interpretation of the text and history of multiple, related provisions of the Alabama Constitution and statutes as well as numerous decisions of the Alabama courts. See 520 U.S. at 787-91. Here, in contrast, the interpretive issue turns on the meaning of a single sentence in a single statute. See *Cole* v. *Richardson*, 405 U.S. 676, 683 (1972) (according no deference to three-judge panel's "highly literalistic" reading of bare text of state statute). The court of appeals is in no better position than this Court to say what that sentence means. See *Leavitt*,

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[6] As explained in the petition (at 16-17), the cases relied on by both the district court and the Ninth Circuit panel, *Cairns v. Sheriff, Clark County*, 508 P.2d 1015 (Nev. 1973), and *Lane v. Second Judicial Dist. Court*, 760 P.2d 1245 (Nev. 1988), deal only with the autonomy of the district attorney in his prosecutorial role, not his final policymaking authority or his power to delegate such authority to deputies.

518 U.S. at 145 (rejecting argument that court of appeals has "some natural advantage in this domain"); *Salve Regina College* v. *Russell*, 499 U.S. 225, 238 (1991).

In any event, this Court "surely ha[s] the authority to differ with the lower federal courts as to the meaning of a state statute," and has not hesitated to do so where "the court of appeals' state-law ruling is plainly wrong" (*Leavitt*, 518 U.S. at 145 (internal quotations omitted)) or is "unreasonable" (*Propper* v. *Clark*, 337 U.S. 472, 486-87 (1949)). See also *Brown* v. *Neumann*, 188 F.3d 1289, 1291 (11th Cir. 1999). Whatever deference may be afforded to the Ninth Circuit's reasoning, it does not compel this Court to ignore the obvious flaws in its analysis and the serious consequences of its decision. See also *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 129-30 (1988) (plurality opinion) (reversing court of appeals' determination, which was based on an analysis of the municipality's laws, that certain city officials were municipal policymakers).

Finally, even if deference to the panel's reading of NEV. REV. STAT. § 252.070(1) were appropriate *at the merits stage* of this case, that would not make the first question less worthy of this Court's review.[7] Plainly, the need to grant deference where appropriate has not prevented this Court from reviewing a series of lower-court decisions involving the issue of final policymaking authority under *Monell*. Moreover, as explained above, the panel's flawed reading of NEV. REV. STAT. § 252.070(1) was only half the problem. The other problem was the panel's "unquestioning reliance on state law to the exclusion of all other evidence" (Pet. 19) – an approach that is flatly inconsistent with *McMillian*. That blinkered approach caused the Ninth Circuit, perversely, to disregard the only evidence presented at trial as to whether the Carson City District Attorney's office actually had a policy of initiating or continuing prosecu-

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[7] The argument about the need to accord deference to the Ninth Circuit has no bearing, of course, on the second question presented. The proper burden of proof in a Section 1983 action is a question of federal law.

tions without probable cause: evidence showing that the District Attorney had an official policy *against* pursuing such prosecutions. The Ninth Circuit's flawed methodology is reason enough to grant review of the first question presented.[8]

* * *

This case presents two important questions of federal law on which there is no dispute that the circuits are sharply divided. If permitted to stand, the Ninth Circuit's misguided decision – which disregards this Court's teachings – will have serious adverse effects on municipal liability not just in Nevada but also in other States both inside and outside the nation's largest circuit. It will also permit an end run around the vital protections of absolute immunity afforded to prosecutors in actions brought under Section 1983. To prevent these adverse consequences, and bring uniformity and greater clarity to this important area of federal law, this Court's review is needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] Cooke & Story has moved to intervene. In petitioner's view, if this Court grants the petition, it should deny the motion to intervene, treat the brief in opposition submitted by Cooke & Story as an *amicus* brief, and then appoint Cooke & Story to represent respondent Webb. That would allow Cooke & Story to be heard and participate without the complications that would follow from formal intervention.

Respectfully submitted.

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